Chan Ming Cheng v Public Prosecutor

COURT OF APPEAL (KUALA LUMPUR) — CRIMINAL APPEAL NO J-05-158 OF 1997
GOPAL SRI RAM, ABDUL KADIR SULAIMAN AND ALAUDDIN JJCA
13 JUNE 2002

Criminal Law *— Dangerous drugs — Trafficking — Accused charged for trafficking and convicted under s 39B(1)(a) of the Dangerous Drugs Act 1959 — Appeal by accused against conviction — Admission of cautioned statement — Whether there were suspicious circumstances surrounding the making of the cautioned statement — Whether the trial judge should have rejected the cautioned statement — Trial judge applied presumptions under both ss 37(d) and 37(da) of the Dangerous Drugs Act 1959 — Whether trial judge had breached the rule against double presumption — Whether the conviction under s 39B of the Dangerous Drugs Act 1959 could stand — Dangerous Drugs Act 1959 ss 37(d), (da), 39B(1)(a)*

Criminal Procedure *— Appeal — Conviction, against — Accused charged with offence of trafficking in dangerous drugs — Admission of cautioned statement — Whether there were suspicious circumstances surrounding the making of the cautioned statement — Whether trial judge should have rejected the cautioned statement*

Criminal Procedure *— Appeal — Conviction, against — Accused charged with offence of trafficking in dangerous drugs — Double presumption — Trial judge applied presumptions under both ss 37(d) and 37(da) of the Dangerous Drugs Act 1959 — Whether trial judge had breached the rule against double presumption — Whether the conviction under s 39B of the Dangerous Drugs Act 1959 could stand*

Evidence *— Statement — Cautioned statement — Accused charged with offence of trafficking in dangerous drugs — Accused admitted that the drugs belonged to him and that the other persons arrested together with him did not know that he was selling drugs — Accused alleged that if he confessed the other persons detained would be freed — Trial judge admitted the cautioned statement — Whether there were suspicious circumstances surrounding the making of the cautioned statement — Whether trial judge should have rejected the cautioned statement*

The appellant was charged for trafficking in 154.3g of heroin and convicted of that offence under s 39B(1)(a) of the Dangerous Drugs Act 1959 ('the Act'). A police party had raided a house in Taman Daya, Johor Bahru on 13 January 1996. The police, having entered the house, forced entry into a room occupied by the appellant. A search on one of the drawers, which was locked, revealed four large plastic packets, four medium-sized and nine small plastic packets containing a yellowish substance which was suspected to contain drugs. The packets containing the yellowish substance were sent for chemical analysis, which revealed that they contained 154.3g of heroin. When the police raided the room, there were three other persons ('Lee', 'PW9' and 'PW10') in occupation of the house in question. All the four persons were taken into police custody. Later they were released on 26 January 1996, except the appellant. On 18 January 1996, a cautioned statement was recorded from the appellant wherein he admitted ownership of the drugs recovered from his room.

At the trial, the prosecution sought to tender the appellant's cautioned statement. Objection was taken and a trial within a trial then took place. The recording officer, PW1, the interpreter of the statement, PW2 and the arresting officer, PW3 denied any impropriety in the recording of the statement. PW1 and PW2 maintained that the statement was voluntarily given. It was put to each of them under cross-examination that the appellant had been induced to make the statement. It was put that the inducement was to the effect that if the appellant confessed to having possession of the drugs, PW9, PW10 and Lee would be released from custody. If he did not so confess then they would be all tried together for trafficking. The appellant also alleged on oath that he was given an assurance that in return for his confession he would not be charged in court but would merely be detained without trial. The learned judge, after hearing the evidence in the trial within the trial, admitted the statement. The appellant was convicted under s 39B of the Act. This was the appellant's appeal against the conviction.

Held, allowing the appeal:

(1) There is no burden on an accused to prove that the statement recorded from him was involuntary. The burden lies on the prosecution to show positively that the statement is voluntarily given. There is also no burden on an accused to raise a reasonable doubt as to the voluntariness of a cautioned statement. The only burden on an accused is to show suspicious circumstances surrounding the making of or recording of the cautioned statement. So long as the suspicion is reasonable as to the voluntariness of the statement, it is incumbent on the trial judge to hold it inadmissible (see p 740D–F).

(2) In the instant case, there were suspicious circumstances surrounding the making of or recording of the cautioned statement. First, there was the allegation by the appellant that if he confessed the other three persons would go free. The cautioned statement was recorded on 18 January 1996 and not long after, ie on 26 January 1996, the other three men were released. Secondly, the cautioned statement in its own terms raised a high degree of suspicion because in this statement, a single question was addressed to the appellant in which he was asked if he wished to say anything. The appellant's immediate response to this question was to admit that he was the owner of the heroin and that the three others did not know he was selling drugs. This was a very strange response and it appeared to confirm what the appellant gave in evidence in the trial within a trial. His response ought to have excited the suspicion of the trial judge (see pp 740F–741A).

(3) Therefore, the appellant had met the requisite legal test for the rejection of the cautioned statement. He was entitled to a direction in that regard from the trial judge but no such direction

was given. As such, the trial judge had applied the wrong test and accordingly misdirected himself on the evidence. The cautioned statement ought to have been rejected by the trial judge and he would indeed have done so had he applied the correct test (see p 741A–B).

(4) Since the cautioned statement ought not to have formed any part of the evidence, the appellant's conviction under s 39B of the Act could not be sustained. However, there was abundant evidence to support the finding of the trial judge that the appellant was in possession of the heroin. The requirements of s 37(d) of the Act were therefore satisfied (see p 741C).

(5) A further ground for setting aside the conviction under s 39B of the Act was that the trial judge had breached the rule against double presumption stated in *Muhammed bin Hassan v Public Prosecutor* [1998] 2 MLJ 273. The trial judge had proceeded on s 37(d) of the Act to support his finding that the appellant was in possession of the heroin but then went on to hold that the appellant was guilty of trafficking on application of the presumption under s 37(da) of the Act. This direction therefore offended the double presumption rule and hence the conviction under s 39B of the Act could not stand. It should be set aside and substituted with a conviction under s 12(2) and punishable under s 39A(2) of the Act (see p 741C–F); *Muhammed bin Hassan v Public Prosecutor* [1998] 2 MLJ 273 followed.

(6) With regard to the sentence, the appellant had two previous convictions for offences of a similar nature and the weight of the heroin in the present case was 30 times the trigger point prescribed by s 39A(2)(a) of the Act. Taking into account the appellant's age and other relevant circumstances, the maximum sentence of 20 years' imprisonment, commencing from the date of his arrest and 12 strokes of the rotan should be imposed on the appellant (see p 741F–G).

[Bahasa Malaysia summary

Perayu telah dituduh dengan kesalahan mengedar 154.3g heroin dan disabit dengan kesalahan tersebut di bawah s 39B(1)(a) Akta Dadah Berbahaya 1959 ('Akta tersebut'). Sepasukan polis telah menyerbu sebuah rumah di Taman Daya, Johor Bahru pada 13 Januari 1996. Setelah memasuki rumah tersebut, polis memecah masuk sebuah bilik yang diduduki oleh perayu. Geledahan sebuah laci, yang dikunci, mendedahkan empat bungkusan plastik besar, empat bungkusan plastik saiz sederhana dan sembilan bungkusan plastik kecil yang mengandungi bahan berwarna kuning yang disyaki mengandungi dadah. Bungkusan-bungkusan yang mengandungi bahan kuning itu dihantar untuk analisa kimia, yang menunjukkan bahawa mereka mengandungi 154.3g heroin. Apabila pihak polis menyerbu bilik

tersebut, tiga orang lain ('Lee', 'SP9' dan 'SP10') menduduki rumah tersebut. Keempat-empatnya ditahan oleh polis. Kemudian mereka telah dibebaskan pada 26 Januari 1996, kecuali perayu. Pada 18 Januari 1996, satu pernyataan beramaran direkod dari perayu dalam mana ia mengakui milikan dadah yang dijumpai di biliknya. Di perbicaraan, pihak pendakwa memohon untuk mengemukakan pernyataan beramaran perayu. Bantahan dikemukakan dan satu perbicaraan dalam perbicaraan kemudiannya berlangsung. Pegawai perakam SP1, penterjemah kenyataan SP2 dan pegawai yang menangkap, PW3 menafikan apa-apa kelakuan sumbang dalam rakaman pernyataan. SP1 dan SP2 berkeras bahawa pernyataan itu diberi secara sukarela. Setiap satu diperiksa balas bahawa perayu telah didorong membuat pernyataan itu. Ia dihujah bahawa dorongan adalah untuk memberi kesan sekiranya perayu mengaku memiliki dadah itu, SP9, SP10 dan Lee akan dibebaskan dari tahanan. Andainya ia tidak mengaku sedemikian, maka kesemua mereka akan dibicarakan secara bersama untuk kesalahan mengedar. Perayu juga mendakwa atas sumpah bahawa beliau telah diberikan jaminan bahawa sebagai balasan pengakuan ia tidak akan dipertuduh di mahkamah tetapi cuma akan ditahan tanpa perbicaraan. Setelah mendengar keterangan perbicaraan dalam perbicaraan, hakim yang arif menerima masuk pernyataan tersebut. Perayu disabitkan di bawah s 39B Akta tersebut. Ini merupakan rayuan perayu terhadap sabitan.

Diputuskan, membenarkan rayuan tersebut:

(1) Tiada beban pada seseorang tertuduh untuk membuktikan bahawa pernyataan yang direkod darinya adalah tanpa sukarela. Beban terletak pada pihak pendakwaan untuk menunjuk secara positif bahawa pernyataan telah diberikan secara sukarela. Tiada juga beban pada seseorang tertuduh untuk membangkitkan keraguan munasabah mengenai kesukarelaan satu pernyataan beramaran. Satu-satunya beban pada tertuduh adalah untuk menunjukkan keadaan syak yang mengelilingi pembuatan atau rakaman pernyataan beramaran. Selagi perasaan syak adalah munasabah berhubung dengan kesukarelaan pernyataan tersebut, hakim perbicaraan wajib memutuskan ia tidak boleh diterima (lihat ms 740D–F).

(2) Dalam kes ini, wujudnya keadaan syak mengelilingi pembuatan atau rakaman pernyataan beramaran. Pertama, tohmahan perayu bahawa sekiranya ia mengaku, tiga orang yang lain itu akan dibebaskan. Pernyataan beramaran dirakam pada 18 Januari 1996 dan tidak lama selepas itu, iaitu pada 26 Januari 1996, tiga orang lelaki yang lain dibebaskan. Kedua, pernyataan beramaran sendirinya menimbulkan darjah prasangka yang tinggi kerana dalam pernyataan ini, satu soalan sahaja dikemukakan kepada perayu yang mana beliau ditanya sama ada ia ingin mengata sesuatu. Jawapan serta-merta perayu kepada soalan ini adalah

untuk mengakui bahawa ia merupakan pemilik heroin dan bahawa tiga orang yang lain itu tidak tahu beliau menjual dadah. Ini adalah jawapan yang aneh dan seolah-olah mengesahkan apa yang diberi oleh perayu dalam keterangan di perbicaraan dalam perbicaraan. Jawapannya seharusnya telah menimbulkan perasaan syak pihak hakim perbicaraan (lihat ms 740F–741A).

(3) Maka, perayu telah memenuhi ujian undang-undang yang perlu untuk menolak pernyataan beramaran. Beliau berhak diberikan arahan berhubung perkara ini daripada hakim perbicaraan tetapi tiada arahan sedemikian diberikan. Oleh itu, hakim perbicaraan telah memakai ujian yang salah dan dengan itu, salah arah dirinya atas keterangan. Pernyataan beramaran seharusnya ditolak oleh hakim perbicaraan dan beliau pasti berbuat demikian seandainya beliau telah memakai ujian yang betul (lihat ms 741A–B).

(4) Oleh kerana pernyataan beramaran tidak sepatutnya membentuk sebahagian daripada keterangan, sabitan perayu di bawah s 39B Akta tersebut tidak boleh dikekalkan. Namun demikian, terdapat keterangan yang amat banyak untuk menyokong keputusan hakim perbicaraan bahawa perayu memiliki heroin. Maka, keperluan s 37(d) Akta tersebut dipenuhi (lihat ms 741C).

(5) Alasan lanjut untuk mengetepi sabitan di bawah s 39B Akta tersebut adalah bahawa hakim perbicaraan telah mungkir kaedah terhadap anggapan berganda yang dinyatakan dalam *Muhammed bin Hassan v Public Prosecutor* [1998] 2 MLJ 273. Hakim perbicaraan telah meneruskan atas dasar s 37(d) Akta tersebut untuk menyokong keputusan beliau bahawa perayu memiliki heroin tetapi terus memutuskan bahawa perayu bersalah kerana mengedar dengan pemakaian anggapan di bawah s 37(da) Akta. Maka arahan ini melanggar kaedah anggapan berganda dan justeru itu sabitan di bawah s 39B Akta tersebut tidak boleh kekal. Ia harus diketepikan dan diganti dengan sabitan di bawah s 12(2) dan boleh dihukum di bawah s 39A(2) Akta tersebut (lihat ms 741C–E); *Muhammed bin Hassan v Public Prosecutor* [1998] 2 MLJ 273 diikut.

(6) Mengenai hukuman, perayu mempunyai dua sabitan terdahulu untuk kesalahan yang bersifat sama dan berat heroin dalam kes ini adalah 30 kali takat cetusan yang ditetapkan oleh s 39A(2)(a) Akta tersebut. Dengan mengambil kira umur perayu dan keadaan relevan yang lain, hukuman maksima penjara 20 tahun, mulai dari tarikh tangkapan, dan 12 sebatan rotan dikenakan ke atas perayu (lihat ms 741F–G).]

Notes

For cases on appeal against conviction, see 5 *Mallal's Digest* (4th Ed, 2001 Reissue) paras 232–248.

For cases on cautioned statement, see 7 *Mallal's Digest* (4th Ed, 2001 Reissue) paras 2156–2164.

For cases on Dangerous Drugs Act 1952 s 39B(1)(a), see 4 *Mallal's Digest* (4th Ed, 2000 Reissue) paras 167–242.

Cases referred to

Cheong See Leong v PP [1948–49] MLJ Supp 56 (refd)
Herchun Singh & Ors v PP [1969] 2 MLJ 209 (refd)
Muhammed bin Hassan v PP [1998] 2 MLJ 273 (folld)
PP v Law Say Seck & Ors [1971] 1 MLJ 199 (refd)
Sandra Margaret Birch v PP [1978] 1 MLJ 72 (refd)
Yap Chai Chai & Anor v PP [1973] MLJ 219 (refd)

Legislation referred to

Criminal Procedure Code s 113
Dangerous Drugs Act 1959 ss 37A, 39B(1)(a)
Evidence Act 1950 s 24

Appeal from: Criminal Trial No 45–9 of 1996 (High Court, Johor Bahru)

Hisyam Teh Poh Teik (*Teh Poh Teik & Co*) for the appellant.
Abdul Wahab bin Mohamed) (*Muhammad Iskandar bin Ahmad* with him) (Deputy Public Prosecutors, AG's Chambers) for the respondent.

Gopal Sri Ram JCA (delivering the judgment of the court): On 13 January 1996 at about 3.45am, a police party raided premises No 121, Jalan Rumbia 39, Taman Daya, Johor Bahru. It was a semi-detached house. They were led into the house by one Lee Poh Soon who was in the hall when the police party arrived. The police, having entered the house, proceeded to the room occupied by the appellant. The door was locked. They forced entry into the room. There was some dispute about what the appellant was doing when the police entered. But nothing turns on it. There was a table in the room. A search on one of the drawers, which was locked, revealed four large plastic packets, four medium sized and nine small plastic packets containing a yellowish substance which was suspected to contain drugs. A search of the second drawer led to the recovery of 50 large plastic packets and 20 small plastic packets, all of which were empty. There was some dispute whether the appellant assisted in the opening of these drawers. Again, nothing turns on this.

The packets containing the yellowish substance were sent for chemical analysis which revealed that they contained 154.3g of heroin.

At the material time, that is to say when the police raided the room, there were three other persons in occupation of the house in question. One was Lee Poh Soon whom we mentioned a moment ago. The other two were PW9 and PW10, who were the appellant's workers at his stall. All the four persons were taken into police custody. Later, they were released on 26 January 1996, except the appellant.

A On 18 January 1996 at about 10am, a cautioned statement was recorded from the appellant in which he admitted ownership of the drugs recovered from his room. The appellant was later charged for trafficking and convicted of that offence under s 39B(1)(a) of the Dangerous Drugs Act 1959 ('the Act').

B At the trial, the prosecution sought to tender the appellant's cautioned statement. Objection was taken. A trial within a trial then took place at which the recording officer, PW1, the interpreter of the statement, PW2 and the arresting officer, PW3 gave evidence. They denied any impropriety in the recording of the statement. PW1 and PW2 maintained that the statement was voluntarily given. It was put to each of them under cross-C examination that the appellant had been induced to make the statement. It was put that the inducement was to the effect that if the appellant confessed to having possession of the drugs, PW9, PW10 and Lee Poh Soon would be released from custody. If he did not so confess then they would be all tried together for trafficking. The appellant also alleged on oath that he was given an assurance that in return for his confession he would not be charged in D court but would merely be detained without trial.

The learned judge, after hearing the evidence in the trial within the trial, admitted the statement. When he came to give his reasons for that decision he said that the appellant had failed to raise a reasonable doubt as to the voluntariness of the cautioned statement.

E Before us, a number of points were taken for the appellant, including the argument that there had been a breach of the rule in *Muhammed bin Hassan v Public Prosecutor* [1998] 2 MLJ 273, what has come to be known as the rule against double presumption. But it was readily conceded by En Hisyam Teh Poh Teik of counsel for the appellant that the validity of those F arguments turned upon the admissibility of the cautioned statement. This concession was properly made by counsel. While an accused may not be convicted on the confession of a co-accused (see *Herchun Singh & Ors v Public Prosecutor* [1969] 2 MLJ 209, *Yap Chai Chai & Anor v Public Prosecutor* [1973] 1 MLJ 219), an accused may be convicted on his own confession.

G That brings us to the question whether the cautioned statement was rightfully admitted. Now this cautioned statement was recorded under s 37A of the Act. That section contains a proviso which is a common feature of all such provisions appearing in different criminal statutes, including s 113 of the Criminal Procedure Code.

H In *Sandra Margaret Birch v Public Prosecutor* [1978] 1 MLJ 72, Syed Agil Barakbah J (as he then was) pointed out that the proviso to s 37A of the Act was in terms of s 24 of the Evidence Act 1950 and housed the judges' rules.

The central feature of the proviso and s 24 is the phrase 'appears to the I court'. That phrase has been explained in a number of cases but we find it sufficient to refer to one of these. In *Public Prosecutor v Law Say Seck & Ors* [1971] 1 MLJ 199, Sharma J said at p 201:

> I have been told that the use of the word 'appears' in s 24 is very significant and the word 'proved' has purposely not been used by the legislature. I quite agree. A confession can, of course, be rejected on a valid ground or conjecture but there must be something before the court on which such a valid conjecture can rest. In this case, I think there is sufficient evidence on which I can safely base a reasonably well founded belief in the hypothesis of a seeming inducement which avoids the confession under our laws. If the accused is able to point to some circumstances which arouse suspicion the confession cannot be admitted. A mere possibility that the confession was not voluntary is insufficient to warrant its rejection but a probability would suffice to dictate its rejection in evidence.

We would also refer to another passage in the said judgment, also at pp 201–202:

> Considering the age of the two accused and the other circumstances to which I have already referred, I may say that while I am quite prepared to believe PW9, PW12 and PW15, I cannot say that I do not believe the two accused persons. I am not entitled to take that attitude merely because they appear as accused persons before me. They have given evidence on oath. The position thus is that I am unable to say that I disbelieve the accused, and my mind is not free from doubt as to the voluntary nature of the confessions. In the result, I hold that exhs P11 and P14 are not admissible and they will not be read, heard or used at the hearing of this trial.

What these passages amount to is this. There is no burden on an accused person to prove that the statement recorded from him is involuntary. The burden lies on the prosecution to show positively that the statement was voluntarily given. There is also no burden on an accused to raise a reasonable doubt as to the voluntariness of a cautioned statement. The only burden on an accused is to show suspicious circumstances surrounding the making of or recording of the cautioned statement. So long as the suspicion is reasonable as to the voluntariness of the statement, it is incumbent on the trial judge to hold it inadmissible.

Now what are the suspicious circumstances here? First, there is the allegation by the appellant that if he confessed, the other three would go free. To recall, the cautioned statement was recorded on 18 January 1996. Not long after, that is to say on 26 January 1996, the other three men were released. Secondly, the cautioned statement in its own terms raises a high degree of suspicion. Here we would adopt in its entirety the remarks made by our learned brother Abdul Kadir Sulaiman JCA, in the course of arguments this morning.

As our learned brother pointed out, a recording officer is meant to be an independent, uninterested person (see *Cheong See Leong v Public Prosecutor* [1948–49] MLJ Supp 56). He would therefore be unaware of the facts of an accused person's case or the circumstances surrounding his arrest or indeed the nature of the allegation against him. Yet, we find in this statement a single question addressed to the appellant asking him if he wished to say anything. The appellant's immediate response was to the effect that he admitted to being the owner of the heroin in question and that the three others did not know he was selling drugs. We find that to be a very

A strange response. It excites our suspicion because it appears to confirm what the appellant gave in evidence in the trial within a trial. It certainly ought to have excited the suspicion of the learned judge.

In our considered judgment, the appellant has therefore met the requisite legal test for the rejection of the cautioned statement. He was
B therefore entitled to a direction in that regard from the learned judge. However, a careful, scrutiny of the judgment reveals, no such direction. It is our respectful view that the learned judge applied the wrong test and accordingly misdirected himself on the evidence. The cautioned statement ought to have been therefore rejected by the learned judge and he would indeed have done so had he applied the correct test.

C Having come to the conclusion that the cautioned statement ought not to have formed any part of the evidence, we are satisfied that the conviction of the appellant under s 39B of the Act cannot be sustained. However, there is, in our respectful view, abundant evidence to support the finding of the learned judge that the appellant was in possession of the proscribed drug. The requirements of s 37(d) of the Act are therefore satisfied.

D The difficulty here is that the learned judge proceeded on s 37(d) of the Act and went on to hold that the appellant was guilty of trafficking on application of the presumption under s 37(da) of the Act. His direction therefore offends the double presumption rule to which we have already adverted. The conviction under s 39B cannot therefore stand. It should be
E set aside and substituted with a conviction under s 12(2), punishable under s 39A(2) of the Act. We so order.

We will now hear arguments on the question of sentence.

We have heard arguments on sentence from both learned counsel and the learned deputy. The appellant has two previous convictions for offences
F of a similar nature. This is a very serious case. We cannot over emphasize our duty to have regard to the public interest. The weight of the drug in the present case is 154.3g, that is to say, 30 times the trigger point prescribed by s 39A(2)(a) of the Act.

Taking into account the appellant's age and other relevant circumstances we would impose the maximum sentence of 20 years'
G imprisonment, commencing from the date of his arrest and 12 strokes of the rotan.

Before we conclude we would like to record our appreciation to both the learned deputy, En Abdul Wahab Mohamed and En Hisyam Teh Poh Teik who have ably argued this appeal. But for their efforts this *extempore*
H judgment would not have been possible.

Delivered in open court at the conclusion of arguments on 13 June 2002.

Appeal allowed.

I Reported by Lim Lee Na